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No. 76-1251

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

FORD MOTOR COMPANY
and
J. WALTER THOMPSON COMPANY, *Petitioners*,
v.
FEDERAL TRADE COMMISSION, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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The brief in opposition demeans the important issues presented by this case.

I.

An agency's interpretation of its own rules is, of course, generally entitled to great weight. The cases cited (Br. Opp. 8-9) are, however, inapposite here.

1. Rule 2.34 deals with the Commission's right to withdraw its "provisional" acceptance of a proposed

consent order after the public comment period. The rule puts the public and parties on notice that acceptance of the settlement offer is provisional, *i.e.*, not final. The rule does not address, and is wholly silent upon, the separate, but not unrelated, question whether a party is barred from withdrawing its *offer* before final acceptance.

2. The term "provisional acceptance" is the Commission's, not ours. Prior to the appeal of this case in the court below, the Commission always used the term "provisional" in its press releases and in its formal notices placing proposed consent orders upon the public record for comments. The "provisional" character of such acceptances has also been recognized by the courts. (Pet. 4-5, notes 4, 6.) In this case, consistent with its established practice, petitioners were notified by the Commission on June 17, 1974, that it had "provisionally accepted" the consent agreements; the press releases issued by the Commission also characterized its acceptance as "provisional". (Pet. App. 25a, J. A. 23-25.) Only after the appeal was taken in this case did the Commission eliminate the word "provisional" from its consent settlement notices and releases. (It nowhere appears in the brief in opposition, having now been excised from the Commission's lexicon.) Whatever the label, the provisional, nonfinal character of the acceptance remains unchanged.

3. The absence of any prior Commission interpretation of Rule 2.34 to preclude withdrawal of a settlement offer before final acceptance renders its action in this case unlawful and unfair. When petitioners submitted their offers ten months earlier, they could not have foreseen either that the Commission would repudiate its prior consistent interpretation of the rule that acceptances are merely "provisional", or that it would retroactively invoke the silence of its rule concerning withdrawal of *offers* to decree that such offers, once provisionally accepted, constitute an irrevocable waiver of a party's constitutional and statutory right to a hearing.

Recognizing (Br. Opp. 11) that in this case it "construed, for the first time, a published rule," the Commission cites *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 291-94 (1974), as supporting its right to apply that novel construction retroactively. *Bell* is clearly irrelevant. The case involved only the right of an agency to choose between adjudication and rulemaking as techniques for developing policy. It did not approve retroactive application of a rule that is silent—or, at best, ambiguous—to force upon protesting parties a "waiver" of fundamental legal rights.

4. The brief in opposition (p. 10, note 9) suggests "the reasonableness of the Commission's interpretation of its rules as *not conferring* a comparable right [of withdrawal] upon private parties" (italics added). It is not for the Commission to "confer" upon an offeror the right to withdraw an offer before acceptance. The brief in opposition cites the "general rule of law [that] an offeror may not withdraw his offer once it has been accepted" (p. 9). The same rule of law, not Section 2.34 of the FTC's Rules, confers a reciprocal right of withdrawal *before* acceptance.

The question now, as it has been throughout this proceeding, is at what point acceptance occurs. Does Section 2.34 limit, abrogate or deny petitioners their historic common law right? More precisely, should petitioners have known that the gaps and ambiguities

of Section 2.34 would be construed by the Commission, for the first time in its history, ten months after petitioners had submitted their offers, to repudiate its own prior consistent treatment of acceptances under Section 2.34 as a provisional stage only in the consent process?

5. The brief in opposition further states that Rule 2.34 is "designed, *as the court of appeals explained* (Pet. App. 6a), to allow the Commission 'in the public interest to escape from the consequences of the provisional consent if public comment provides objections which were not previously considered.'" (Br. Opp. 10, note 9; italics added.) Yet the Commission at no time ever offered any such "explanation" of the rule that it retroactively applied to petitioners in this case.

The "provisional" nature of the Commission's acceptance during the public-comment period is vital to the process of consent settlement. A proposed consent order is negotiated privately. Once it is exposed to public view, objections to its sufficiency, effectiveness, and fairness may come to light for the first time, and become the concern of both the Commission and the parties. Comments may come from customers, competitors, suppliers, consumers, public interest groups, and others.

There is nothing to suggest that these comments will be one-sided only, pointing to deficiencies in the restraints imposed on the respondent. It is not unlikely that public exposure may show the restraints to be too rigorous, too punitive, or, as in this case, discriminatory and unfair. Petitioners first learned of the Commission's more favorable treatment of their major competitors only after the proposed Ford/JWT

orders were placed on the public record. No reason appears why only the Commission, and not a party who has offered a settlement not yet finally accepted, should be allowed "to escape from the consequences of the provisional consent" if the public comments show that the order would be inequitable or unfair.[1]

II.

The brief in opposition does not respond to the *Chenery/Burlington Truck Lines* and *Moog/Universal-Rundle* issues presented by this case.

Even assuming, *arguendo,* that petitioners had no right to withdraw the settlement offers during the public-comment period, the question remains whether the Commission acted arbitrarily, capriciously, or in abuse of its discretion in simply refusing, as the Court of Appeals held (Pet. App. 33a), "to comment on, talk about, or give evidence of any serious consideration to petitioners' claims of competitive disadvantage" as a basis for seeking Commission withdrawal of its provisional acceptance.[2]

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[1] The brief in opposition (Br. Opp. 12, note 11) argues, without factual citation, that petitioners had no reason to believe, when they submitted their offers, that similarly broad orders would be issued by the Commission against their competitors. In contrast, contrary affidavits executed by petitioners' responsible officials were attached to the Petition for Reconsideration filed with the Commission on December 10, 1974 (J. A. 71, 124-40). Any such issue of fact should be tried before the Commission, not this Court.

[2] The brief in opposition erroneously states that petitioners asserted an "unqualified right unilaterally to withdraw without regard to competitors' orders," and that "[a]ny questions regarding a private party's right to withdraw its consent because of

1. After agreeing to entry of more narrow orders against General Motors, it was clearly within the Commission's authority and discretion to limit the scope of the orders against petitioners to the practices alleged in the complaint, so as to prevent them from being unduly disadvantaged vis-a-vis their competitors. *Moog Industries, Inc.* v. *FTC,* 355 U.S. 411, 413 (1958). Yet the Commission at no time acknowledged the issues raised by petitioners' requests for withdrawal, much less offered any statement, however brief, of the grounds for denial.

Section 6 of the Administrative Procedure Act, 5 U.S.C. 555(e), (Br. Opp. 3) provides that denial of an informal application made in connection with any agency proceedings "shall be accompanied by a brief statement of the grounds for denial." We agree that an agency is "not obliged to explain the basis for its actions in [consent order] proceedings with the same detail that is necessary in formal agency adjudications" (Br. Opp. 13, note 13). But here there was *no* detail, simply a rote incantation of the "public interest." (Pet. App. 32a.) This was not a reasoned explanation that a losing party may understand or a court may review. The governing principle is no less applicable to discretionary agency actions. *NLRB* v. *Metropolitan Ins. Co.,* 380 U.S. 438, 443 (1963).

2. Once again, in this Court, Commission counsel offer an entirely novel explanation for the denial of

alleged differences in a competitor's order is therefore not properly before this Court." (Br. Opp. 8, note 8.)

The claims of competitive disadvantage were urged explicitly and repeatedly by petitioners, in support of their requests that the Commission withdraw its provisional acceptance, in order to remove the competitive disparities. Only when the Commission made no response before expiration of the public-comment period did petitioners withdraw the offers of settlement. (Pet. App. 29a-32a; J. A. 26-47.)

petitioners' claims. Petitioners, they say (Br. Opp. 12), "could have insisted that their proposed agreements contain 'most favored nation' clauses linking the relief contemplated to developments in other cases involving petitioners' competitors."

In the absence of such a provision,[3] petitioners addressed their claims of competitive discrimination to the Commission's responsible discretion. As this Court held in *FTC* v. *Universal-Rundle Corp.,* 387 U.S. 244, 251 (1967), the Commission "does not have unbridled power" to enforce orders imposing competitive injury; its refusal to modify or stay an order, where such a claim is made, must be "based upon a reasonable evaluation of the merits of the petition * * *."

3. The Court of Appeals found that the Commission not only made no "reasonable evaluation" of the merits of petitioners' claims of competitive disadvantage; it gave no evidence of *any* serious consideration (Pet. App. 33a). The court upheld the Commission's orders not on the basis of anything the Commission stated by way of explanation or justification, but solely on what the court apparently assumed the Commission *might* have had in mind.

4. Any one of numerous *conceivable* reasons might justify rejection of a claim of competitive disadvantage: that it lacks sufficient substance, is not supported by the facts, is not filed in good faith but for purposes of delay, reflects a belated change of mind, etc. None

[3] We would only note here that while "most favored nation" clauses are occasionally accepted in consent agreements, such provisions have generally been disfavored by the Commission.

of these reasons is conveyed by the single sentence: "The Commission finds that the public interest would not be served by such action [*i.e.*, withdrawal of provisional acceptance]." (Pet. App. 32a.) And, in fact, no such reason has ever been found or stated by the Commission—as distinguished from its appellate counsel and the Court of Appeals.

The ground upon which the Court of Appeals affirmed was never mentioned by the Commission or its staff in the entire administrative proceedings or on appeal. It was first suggested by FTC appellate counsel in a petition for rehearing, 22 months after the orders were issued. The brief in opposition now states (p. 7): "Although the court did not expressly so state, its affirmance of the Commission's order apparently was based on *the court's view* that, in light of the *GM-Cadillac* order (as well as the *GM-Vega/Opel* order), there was insufficient substance to petitioners' claims * * *." (Italics added.) [4]

In short, even the Government apparently recognizes that the statutory requirement that *the agency* make "a brief statement of the grounds for denial" has not been met here. Instead, we have only conjecture as to the basis for the Commission's unexplained action, and an affirmance based on *the court's,* not the Commission's, apparent (and, we submit, erroneous) view that there was "insufficient substance" to petitioners'

[4] The only statement in this regard by the Court of Appeals was plainly erroneous: *i.e.*, that the *GM-Cadillac* order "contained a similar broad prohibition concerning performance claims to that about which the Ford petition to this court complained." (Pet. App. 38a.) It did not. (See Pet. 17, note 19.)

claims. If that was indeed the Commission's reason, its failure to state *any* reason in this case, unless reversed on appeal, will encourage a belief that an agency's total disregard of the minimal reason-stating requirement of Section 6 will be tolerated by the courts as harmless error.

The essence of the *Chenery/Burlington Truck Lines* rule, as embodied in Section 6 of the Administrative Procedure Act (5 U.S.C. 555(e)), is that reviewing courts should not have to guess at the basis for agency action. It is counter-productive to "bail out" an agency which fails to give reasons for its actions, as in this case. The more such agency derelictions are overlooked or excused, the more likely will they recur—to the detriment of the process of judicial review and the public interest.

CONCLUSION

Petitioners ask only that the "consent" orders against them be vacated so that they may either enter into a fair and equitable settlement or be permitted to defend against the allegations of the complaint. To force "consent" orders upon unconsenting and protesting parties, holding them to a "waiver" of constitutional rights earlier withdrawn, and applying retroactively a novel, unpublished, and inconsistent interpretation of an ambiguous rule, promotes neither the

integrity of administrative processes nor the fairness of agency settlement procedures.

Respectfully submitted,

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